SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

C. FRANK SMITH,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI.

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State of Tennessee.

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REPLY TO PETITION FOR WRIT OF CERTIORARI.

The petitioner, C. Frank Smith, seeks by writ of certiorari to have this Court review the judgment of the Supreme Court of Tennessee affirming his conviction for fraudulently passing and transferring to another a forged paper knowing it to be forged, and for which he was sentenced to serve a term of not less than three nor more than three years in the State penitentiary.

JURISDICTION.

Counsel for the State of Tennessee admits the jurisdiction of this Honorable Court to review the opinion of the Tennessee Supreme Court.

QUESTIONS PRESENTED.

Five questions have been raised in the petition for consideration by this Court. The issues raised by these questions are in substance as follows: (1) Whether or not

Section 27-117, Tennessee Code Annotated, known as the "Harmless Error Statute" in Tennessee may be relied upon to affirm a conviction in a case wherein evidence admitted to be inadmissible was presented to the jury; (2) Whether or not the petitioner was denied due process of law because the trial judge who sat during the criminal proceeding had sat in a previous similar criminal proceeding for a trial in which the petitioner was the defendant; (3) Whether or not the petitioner was denied due process because of being forced to trial four years after the indictment brought about because of his prior convictions for other offenses having been set aside; and (4) Whether or not the petitioner could be required to stand trial on "seven stale indictments" set on three successive days of one trial term.

STATEMENT OF THE EVIDENCE.

The petitioner was an independent dealer for the John Deere Company engaged in the sale of tractors and other farm equipment. When he made a conditional sale of tractors or other equipment, the John Deere Company would purchase some of the contracts and others were financed through local leading institutions.

Roy Scalf bought several pieces of equipment from the petitioner. The purchase about which this prosecution is involved was that of a TD9 International crawler tractor, 1956 model, on which there was a time balance including carrying charges in the amount of $7,961.23. This contract was financed through the First Peoples Bank, apparently of Johnson City, Tennessee.

This same tractor was also financed with the John Deere Tractor Company. It had the name of Roy Scalf signed as the purchaser, but Roy Scalf denied signing the instrument. The petitioner in a conference with John Deere Tractor Company representatives about a year before the

indictment, when questioned about this purchase, stated that either Roy Scalf or one of his sons signed it, and he still indicated this to be true as a witness in his own behalf during the trial. The company records indicate that one payment was made by Smith Tractor Company to the John Deere Company on the indebtedness in question. (The sale was made February 2, 1961, and the payment was made February 6, 1961.) Two of Roy Scalf's sons testified and denied signing the instrument.

As an independent dealer, equipment was delivered to the petitioner for sale to customers. When it was shipped to him, he had fifteen months to settle for it or return the equipment. If the equipment was sold to a consumer, the petitioner had ten days to settle for it. Customers could purchase on conditional sales contracts and the John Deere Company would accept conditional sales contracts in lieu of cash, which were endorsed over to the company by the dealer, and that is what happened with respect to this purchase, except the name of the purchaser, Roy Scalf, was forged.

ARGUMENT.

(1) It is insisted by counsel for the petitioner that since the Supreme Court stated in its opinion that certain evidence admitted in a criminal proceeding against the petitioner was erroneously presented to the jury, the Court could not say the evidence was harmless or did not affect the verdict. If this is not a proper place to apply such a rule authorized by Section 27-117, Tennessee Code Annotated, it is submitted there would never be a place for such a rule but such is not the case. The Tennessee Supreme Court has applied the rule in numerous criminal cases and civil cases saying that the statute should be invoked only where the appellate court can look to the merits of the controversy and determine that it did not affect the verdict of the jury. **Butler v. State**, 185 Tenn. 686; **Oman Construction Company v. Tennessee Central Railway Company**, 212 Tenn. 556; **McBee v. State**, 213 Tenn. 15.

This Honorable Court even with respect to errors affecting constitutional rights has applied the harmless error rule recently in the cases of **Giles et al. v. State of Maryland**, 372 U. S. 767, 87 S. Ct. 793, 17 L. Ed. 2d 737; **Chapman v. State of California**, 383 U. S. 956, 87 S. Ct. 824, 827, 17 L. Ed. 2d 705, 709. In the **Chapman** case it was said:

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not resulting in the automatic reversal of the conviction."

(2) The petitioner insists that he was denied due process of law because the judge who sat during the

criminal proceeding had sat as judge in a criminal proceeding wherein the petitioner was convicted for a similar offense and one of a series of seven instances in which the petitioner had obtained money fraudulently in connection with his business as a John Deere tractor and farm equipment dealer. It has not been found that the Tennessee Supreme Court has passed on this identical question before. The Tennessee Court of Civil Appeals in **Talley v. Talley**, 51 Tenn. App. 622, has decided the question contrary to the petitioner's insistence and this has been true in a number of other jurisdictions as indicated in the Decennial Digest under the topic of Judges, Key No. 47 (2). Among these cases are: **Sawyer v. State**, 119 P. 2d 256; **Walker v. State**, 84 S. W. 2d 383; **Board of Medical Examiners v. Steward**, 102 A. 2d 248; **State v. Neil**, 419 P. 2d 388; **Sinahopoulos v. Villa**, 224 A. 2d 140. This question has been annotated in 57 L. Ed. 1003.

(3) The petitioner insists that he was denied a speedy trial. The indictment was returned in 1962 and the trial resulting in his present conviction was held in 1966. The term "speedy trial" has almost been universally held to be a relative one depending upon the circumstances in each particular case. **United States v. Alagia**, 17 F. R. D. 15, **Sawyer v. State of Wisconsin**, 63 N. W. 2d (Wis.) 749, certiorari denied, 75 S. Ct. 80, 348 U. S. 890, 99 L. Ed. .... To determine whether or not a defendant has been denied a speedy trial, one rule seems to have been applied in all jurisdictions with one or two exceptions and that is, the right is a personal one and one that the defendant waives unless he requests a trial on charges made against him. The following excerpt from the **Alagia** case, supra, at Page 17, sums the matter up as follows:

> ". . . the Court's adoption of the following language of Worthington v. U. S., 7 Cir., 1924, 1 F. 2d 154, certiorari denied, 1924, 266 U. S. 626, 45 S. Ct.

125, 69 L. Ed. 475, is significant. 'The record fails to show a single effort made by defendant * * * to avail himself of a speedy trial. No facts were pleaded bringing the case within the rule requiring a speedy trial; i. e., that the defendant was incarcerated, or, being enlarged, had appeared in open court demanding trial, or otherwise. Defendant's sole reliance was upon the bare fact that the case had not been prosecuted. If the defendant desired a speedy trial, it was his duty to ask for it, and we must assume that it would have been granted, had he made any effort to procure it. His long and uninterrupted acquiescence in the delay bars his right to complain' [168 F. 2d 891]."

It is interesting to note that the delay in the **Alagia** case was approximately three years, and in the **Sawyer** case, the delay was approximately two years. In the latter case, the Court, at Page 751 of the opinion quoted the following from 22 CJS, Criminal Law, Section 469, Pages 719-720:

"Where there is some authority to the contrary, the general rule is that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial must be made by accused to entitle him to a discharge on the ground of delay, at least when accused has been admitted to bail, or is not within the custody of the court."

(4) The petitioner also insists that he was denied due process of law because the District Attorney General would not inform him which of seven indictments he would have to stand trial, and petitioner did not have sufficient time to prepare for all of them. The first answer to this contention is that these offenses were so similar and a part of the same scheme to defraud the John Deere Company by the petitioner that evidence of the other six would

have been admissible on the trial of the particular case under consideration to show lack of mistake. **Mays v. State,** 145 Tenn. 118.

The second answer is that the petitioner might have been tried on all of these cases at one time. See **Bullard v. State,** 208 Tenn. 641, quoting with approval from **McElroy v. United States,** 164 U. S. 76, 81, 17 S. Ct. 31, 33, 41 L. Ed. 355, 357, as follows:

> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same, and where the offenses are in nowise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them."

Ordinarily, in cases where the defendant is tried on a series of similar offenses closely connected, the State is not required to elect which particular offense it will stand upon until the evidence is presented. **Jamison v. State,** 117 Tenn. 58.

It is difficult to understand the petitioner saying that he did not have an opportunity to prepare for these cases since they and the others growing out of the same circumstances had been in litigation for a period of about four years. It also seems somewhat at variance the petitioner's not being granted a speedy trial and at the same time asking for a continuance.

CONCLUSION.

In view of the foregoing, counsel for the Respondent, State of Tennessee, insists that the petition for writ of certiorari in this cause should be dismissed.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee.

Certification.

I hereby certify that a copy of this Reply to Petition for Writ of Certiorari has been forwarded to the Honorable Bernard H. Cantor, Attorney at Law, 126 Spring Street, Johnson City, Tennessee, on this the 19 day of October, 1967.

Thomas E. Fox,
Deputy Attorney General.